IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 1178 of 1997

in

SPECIAL CIVIL APPLICATIONNo 5684 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.THAKKER and
MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

CIVIL HOSPITAL KARMACHARI SAHKARI CANTEEN SOC. LTD.
Versus
STATE OF GUJARAT

Appearance:
MR AJ MEMON for Appellants.
MR KT DAVE AGP for Respondents.

CORAM : MR.JUSTICE C.K.THAKKER and
MISS JUSTICE R.M.DOSHIT

Date of decision: 16/10/97

ORAL JUDGEMENT

Admitted. Mr.K.T.Dave, Assistant Government Pleader waives service of notice of admission on behalf

of respondent authorities. In the facts and circumstances of the case, the appeal is taken up to day for final hearing.

This appeal is filed against the judgment and order passed by the learned Single Judge in Special Civil Application No. 5684 of 1984 decided on July 11, 1997. The appellants are original petitioners. They approached this court by filing the above petition for quashing and setting aside a notice dt. November 16, 1984, Annexure.D to the petition by which they were called upon to vacate canteen alleged to have been constructed illegally on Government land situated between Blocks No.A and B in Civil Hospital, Ahmedabad. It was alleged in the notice that the construction of the canteen resulted in nuisance and annoyance to patients as well as public at large. They were, therefore, asked to vacate the place within four days from the receipt of the notice failing which the authority would take appropriate action for removal. The petition was admitted and interim relief was granted. The petition came up for final hearing. Mr.Memon, learned counsel for the appellants stated that by that time, a suit was filed in the City Civil Court, Ahmedabad. The petitioners, therefore, wanted to withdraw the petition but the learned Judge refused to grant permission and asked the learned counsel to go on with the hearing. Adjournment was granted from time to time and ultimately on July 11, 1997, the matter was decided and the petition was dismissed. In the operative part of the order the learned Single Judge observed that the order passed and notice issued by the authorities could not be said to be illegal or contrary too law. Taking into account the fact that without prior permission, construction was made by the petitioners, which resulted into nuisance and annoyance to patients and particularly to children in the Children Ward and it obstructed light and prevented ventilation in laboratory and in some part of Ward B.2, the learned Single Judge ordered the petitioners to pay exemplary costs of Rs.10,000/-. It is this order which is challenged by the appellants in this Letters Patent Appeal.

Various contentions were raised by the learned counsel for the appellants. It was contended that the matter was decided ex parte in absence of advocate as well as the petitioners. The order, thus was violative of the principle of natural justice and fair play. It was urged that the petition was filed by the petitioners for certain reliefs. At the most, learned Single Judge would have dismissed the matter but he could not have directed the petitioners to vacate canteen premises and

authority could not have been permitted to remove the structure. In similar circumstances, construction was made by other persons and yet no action is taken against them. Therefore, the order is discriminatory and violative of Art.14 of the Constitution of India. Finally, amount of exemplary costs of Rs.10,000/- is highly excessive and disproportionate.

Mr.K.T.Dave, learned A.G.P. supported the order passed by the learned Single Judge. He submitted that looking to the entire material on record and affidavit-in-reply filed in the petition, it is clear that nuisance and annoyance was caused by the petitioners to patients in Children Ward. The construction was illegal and unauthorised. If in the light of these circumstances, an order was passed by the learned Single Judge, it could not be said to be unlawful or contrary to law. Regarding costs he submitted that the learned Single Judge has recorded reasons for awarding cost of Rs.10,000/-. According to him, therefore, appeal deserves to be dismissed.

In our opinion, two questions arise for our consideration. Firstly, whether the order passed by the learned Single Judge deserves interference on merits. Looking to the entire record and judgment of the learned Single Judge, we are fully satisfied that no error apparent on the face of the record is committed by the learned Single Judge in passing the order in question.

As far as hearing is concerned, it is clear from the judgment of the learned Single Judge that from December 23, 1996, time was granted by the learned Single Judge. The matter remained on Board for quite some time. Even on the day on which the petition was decided the matter was called out thrice but nobody was present. If in these circumstances, the matter was decided in absence of the learned counsel for the petitioners, it could not be said that the court had committed any error or the principles of natural justice were not observed and the order is vulnerable. We have, however, heard Mr.Memon on merits and we are satisfied that by passing the impugned order the learned Single Judge has not committed any error of law.

Regarding construction, it is not even the case of the appellants that at any time written permission was granted for construction. Their case in the petition was that oral permission was granted. In the light of denial in affidavit-in-reply filed by the authorities, the learned Single Judge was of the view that no such

permission was granted and it cannot be said that such a view could be said to be arbitrary or unreasonable.

But there is something more also. The learned Single Judge, considering counter-affidavit, along with various letters written from time to time has observed that running of canteen caused annoyance and nuisance to patients and their relatives. Such nuisance was caused to the patients of tender age as the canteen is located near Children's ward. If in the light of this, the learned single Judge has not exercised extraordinary powers, it cannot be said that the order requires interference by appellate court. Ultimately, it cannot be forgotten that the petitioners had invoked Art.226 of the Constitution of India. It is a settled law that such powers can be exercised ex debitoo justitiae, i.e. for doing full and complete justice. It is a discretionary remedy, equitable in nature. Considering all the facts and circumstances, when the learned Single Judge has refused to exercise such power, it cannot be said that the order is illegal.

Moreover, the learned Single Judge has observed in paras 8 to 11 that from the records it appeared that the authorities who had granted permission to run canteen had no power or authority to grant such permission and that the possibility could not be ruled out that such permission was granted illegally by them in connivance with the petitioners. In view of such finding, if the learned Single Judge has passed the impugned order, we would not like to interfere with it.

We also do not see any substance in the argument of Mr.Memon that the action is violative of Art.14 of the Constitution. It is well settled law that Art.14 cannot be invoked to perpetuate illegality. That is not the sweep of Art.14. The learned Single Judge has rightly observed that there was no pleading in the petition as to who were other persons similarly situated. But even if it were so, in our view, the learned Single Judge was right in observing that in the facts and circumstances of the case when the action of the petitioners was contrary to law, Art.14 of the Constitution had no application.

So far as the costs is concerned, though the learned Single Judge has recorded reasons, as the learned counsel for the petitioners was not present before the learned Single Judge when the matter was heard, and decided, the petitioner is a Cooperative Society, members of which are of Class IV employees, the parties ought to have been left to bear their own costs. Moreover,

petition is of the year 1984. Interim relief was granted pursuant to which the petitioners continued to run canteen. In these circumstances, in our opinion, it would have been proper if the petition can be dismissed with no order as to costs.

For the foregoing reasons the Letters Patent Appeal deserves to be partly allowed and is accordingly allowed. So far as the merits of the matter is concerned, we do not see any reason to interfere with the order of the learned Single Judge, except about payment of costs. The order of payment of costs passed by the learned Single Judge is set aside and parties are directed to bear their own costs through out. Order accordingly.

Dt. 16.10.1997.

(C.K.THAKKER J.)

(MISS R. M. DOSHIT J.)